Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1614

OTIS R. BOWEN as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,
et al.

Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Memorandum in Opposition to Petition for Writ of Certiorari

For reasons set forth in this Memorandum, respondent Board of School Commissioners of the City of Indianapolis (IPS) submits that this inter-district school segregation

case is not in an appropriate posture for Supreme Court review.[1]

When this case was last presented for review from a decision of the Court of Appeals for the Seventh Circuit affirming District Court findings of an inter-district violation and requiring an inter-district remedy, this Court vacated the judgment and remanded the case to the Court of Appeals "for further consideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976)," two recent cases explicating the requirement of proof of racially discriminatory intent as the basis for finding a violation of the Equal Protection Clause of the Fourteenth Amendment. 429 U.S. 1068 (1977). The Court of Appeals then carefully considered prior opinions in the case in the light of *Arlington Heights* and *Davis*, identified elements of the inter-district violation in which findings of racial intent had not previously been made, and remanded the case to the District Court "to make further findings of fact from evidence already in the record, or, if necessary as supplemented by additional evidence," A.6.

Petitioners' current effort to obtain review by this Court is apparently predicated on a belief that this Court's prior remand for further consideration should have been treated by the Court of Appeals as a summary reversal of its earlier judgment, leaving the court no choice but to dismiss the complaint for inter-district remedy on grounds

[1] We have chosen not to submit a lengthy Brief in Opposition to Certiorari correcting all of petitioners' omissions of fact and mischaracterizations of the law and the issues. In our view, the genuine issues, if any remain, will emerge clearly only after the actions and hearings directed by the Court of Appeals are concluded and a decision has been rendered by the District Court and reviewed by the Court of Appeals.

that *Davis* and *Arlington Heights* precluded such relief. That, of course, is not the action that this Court took.[2]

Apart from any substantive defect, petitioners' effort to secure review now is premature because they complain of an order lacking the finality that this Court ordinarily requires absent extraordinary circumstances. See, e.g., *Brotherhood of Locomotive Firemen v. Bangor and Aroostook R.R.*, 389 U.S. 327 (1967) where this Court denied review of a ruling remanding the case to the district court on grounds that the case "was not yet ripe for review." *Id.* at 328. The only "extraordinary circumstance" urged by petitioners is a contention that further consideration of the basis for inter-district remedy by the court below "is simply delaying desegregation" within the City of Indianapolis. Petition p. 18. This contention is groundless. Both the United States and the respondent IPS (the original plaintiff and defendant in the intra-district phase of this suit) have joined in urging the implementation of an intra-district remedy in September, 1978; respondent IPS has prepared an intra-district plan for implementation in the Fall of 1978; and the Court of Appeals has ordered that the plan be put into effect unless the District Court determines that it is not sound. (unpublished order in No. 78-1558, May 17, 1978).[3] Clearly then, the Court of Appeals does not view the pendency of the issue of inter-

[2] The difference between the two types of dispositions hardly requires elaboration. Following remand for further consideration in light of a recent decision, this Court after further explication of the facts has sustained the original decision below. See, e.g., *United States v. Virginia Electric Power Company*, 365 U.S. 624 (1961). See also *The Supreme Court, 1960 Term*, 75 Harvard L. Rev. 40, 98-99, 125-127 (1961).

[3] While the Distrirct Court on remand has found defects in the proposed intra-district plan, the remaining issues concern what form of plan will be implemented prior to an ultimate resolution of the inter-district issues, not whether there will be relief. (Entry in No. IP 68-C-225 June 2, 1978).

district relief as a reason for delaying an intra-district remedy.

Further, petitioners entirely misconceive the nature of the issues which remain to be resolved in this case. The question is not whether the added defendant suburban school districts are "guilty of any *de jure* segregation". Petition p. 21. Once it has been established, as it has in this case, that state and local authorities engaged in deliberately segregative acts within the central city school district, the absence of additional unlawful school practices by other districts does not in itself preclude inter-district relief, just as the presence of such practices would not of itself require an inter-district remedy. See *Milliken v. Bradley*, 418 U.S. 717, 745, and at 807-08 (1974) (Marshall, J. dissenting). Rather, the issues are (1) whether the adjudicated constitutional violation by the State and IPS within Indianapolis has produced "a significant segregative effect" in any or all of the suburban districts of Marion County (*Id.* at 745) and (2) whether state officials engaged in other acts, e.g. boundary manipulation or discriminatory housing practices, that contributed to inter-district segregation. *Id.* at 745, and at 755 (Stewart, J. concurring).

For example, a critical question in this case is the legal significance to be attached to the series of State decisions in the 1960s culminating in action to confine IPS to its particular borders while enlarging the boundaries of the City of Indianapolis for other governmental purposes, A.8-12. Among the factors that may have an important bearing on this issue are (1) the existence of a long-standing dual school system within IPS and the pendency of a law suit to disestablish that system at the time that critical state boundary decisions were made; (2) the unremedied inter-district effects of the *de jure* practices within IPS; (3) the permeability of the boundaries between IPS and other Marion County districts during the period when a dual system existed within IPS; (4) the

existence and effects of racially discriminatory state housing practices (both at the time the boundary decisions were made and since) which confined black students to attendance at IPS schools and contributed to the development of all-white schools in suburban districts;[4] and (5) the extent to which the limitation of IPS to its boundaries was a substantive departure from prior state policies favoring the establishment of school districts at least as extensive as the boundaries of relevant municipal jurisdictions.

Once the record on these matters is fully developed, the findings made by the courts below will provide a more ample basis for determining the existence of an inter-district violation, its nature and extent, and the type of remedy needed to cure the violation. The legal standard to be applied to the record evidence in assessing the existence and scope of the inter-district violation is ultimately for this Court to determine.[5] This Court's remand for further

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[4] For example, in 1961 when state law encouraged school district consolidations, such a consolidation was rejected in Marion County based not on educational factors but on "the unanimous opposition of the suburban school districts" (541 F.2d at 1217) at a time when these districts had few or no Negroes "within their borders." 368 F.Supp. at 1203. A finding that the absence of blacks in the suburbs was the product of racially discriminatory state housing policies would shed important light on the racial content of the 1961 rejection of consolidation and on other actions departing from the normal course in preventing the extension of school boundaries.

[5] The standards to be applied in inter-district cases have not yet been formulated with finality and precision by this Court. It *is* clear that boundary changes that interfere with the dismantling of a dual school system must be rescinded even where the actions were not undergirded by a racial purpose. *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972). In other circumstances, however, it has been said variously that a cross-district remedy may be justified if "district lines have been deliberately drawn on the basis of race" (*Milliken* at 745) and if state officials "contributed to the separation of the races by drawing or redrawing school district lines." *Milliken* at 755 (Stewart, J., concurring). We do not take the remand of this case for further consideration in light of *Arlington Heights* and *Davis* to be an ultimate pronouncement on the precise legal standard to be employed.

consideration clearly signaled its desire that the ultimate disposition of this case be informed by a "sensitive inquiry," of the kind called for by *Arlington Heights*, into all the facts and circumstances surrounding State boundary decisions and other important State actions. The Court of Appeals has provided for just such a sensitive inquiry by identifying the issues on which additional findings are required, providing guidance to the District Court and remanding to the District Court for further proceedings.

Respondent IPS believes that the inquiry called for by this Court will reveal an extensive inter-district violation and has sought an opportunity below to develop a full record on the context of state actions alleged to be discriminatory. The development of such a record along with appropriate findings of fact is the only course that will assure that when this case is next presented for appellate review it will be in a posture that permits a definitive disposition that is fair to all the parties.

CONCLUSION

Wherefore, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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